Statutory requirements to attend or use ADR: Victoria

John K Arthur *ISAACS CHAMBERS*

Alternative dispute resolution (ADR) is a process, distinct and alternative from judicial determination, by which a neutral third party assists the parties to resolve their dispute. The National Alternative Dispute Resolution Advisory Council (NADRAC) has defined ADR as an "umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them".[1] ADR is sometimes termed "appropriate dispute resolution" — as in the Civil Procedure Act 2010 (Vic) (CPA), for example.[2] ADR may be classified as facilitative, advisory, determinative or hybrid.[3] It includes negotiation, mediation, conciliation, dispute review boards and early neutral evaluation, as well as statutory adjudication, expert determination[4] and arbitration, whether "stand alone" or by way of a tiered dispute resolution process[5] and whether binding or non-binding.

Outside the ordinary court processes, the parties may, by agreement, refer existing or future disputes between them to ADR, whether by way of arbitration, mediation or expert determination or by way of a tiered dispute resolution clause, or otherwise.[6] These dispute resolution processes will be assisted or even enabled by state legislative, and also court, intervention — such as, in different contexts, arbitration, domestically, by the Commercial Arbitration Act 2011 (Vic), s 8 (stay of court proceedings and reference of the dispute to arbitration) and s 35 (recognition and enforcement of awards); foreign arbitration by the International Arbitration Act 1974 (Cth) (IAA), s 7 (stay of court proceedings and reference of the dispute to arbitration), s 8 (recognition of foreign awards) and s 9 (evidence of awards and arbitration agreements), and by Art 35 of the Model Law (which has the force of law in Australia: IAA, s 16); and in family mediation centres, where evidence of anything said or of any admission or agreement made at, or of any document prepared for the purpose of, a conference with a family mediator is not admissible in any court or legal proceeding: Evidence (Miscellaneous Provisions) Act 1958 (Vic), s 211.

The present focus is on legislative provisions in Victoria that impose requirements in relation to the attendance at, or use of, ADR.[7]

There are three courts in the Victorian court hierarchy: the Supreme Court (which is divided into the trial division and the appeal division), the County Court and the Magistrates' Court.[8] There is also the Victorian Civil and Administrative Tribunal (VCAT).[9] Recently, VCAT was held not to be a "court" for the purposes of s 8(1) of the Commercial Arbitration Act.[10]

Reference to mediation

In Victorian courts and in VCAT, civil proceedings are almost as a matter of course referred to ADR, and generally to mediation.

In most civil proceedings in Victoria, at an early stage of the proceeding a directions hearing will be held, either with the parties attending or "on the papers", at which time an interlocutory timetable for the further conduct of the proceeding will be set. The timetable will cover such matters as pleadings, further and better particulars, discovery, expert reports, mediation and trial. In the Supreme Court, there will generally be two principal directions hearings. The first will set the interlocutory timetable to mediation and the second will make pre-trial directions for witness statements, for court books and for a trial date. In some cases, proceedings will not be allocated a trial date until witness statements (lay and expert) have been delivered and court books have been prepared.[11]

Order for mediation

The orders in the timetable, for mediation, will be to the following effect:

1. The proceeding be referred to a Mediator to be agreed between the parties or in default of agreement to be appointed by the Court, such mediation to take place by/not to take place before #.
2. Subject to the terms of this order, the solicitor for the Plaintiff shall, after consultation with all parties, deliver to the Mediator a copy of this order, all pleadings (including requests for and further particulars) and a copy of any other relevant information, and take all steps necessary to ensure that the mediation commences as soon as practicable.

3. The mediation shall be attended by those persons who have the ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement and the lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.
4. The Mediator not later than # report back to the Court whether the mediation is finished.
5. Subject to any further order, the costs of the mediation be paid in the first instance by the parties in equal shares.[12]

In Victoria, there are 27 different Acts and 18 statutory rules and regulations that make reference to "mediation", six Acts that make reference to "alternative dispute resolution", and four Acts that make reference to "appropriate dispute resolution".[13]

First and foremost are the Acts by which each of the courts in the Victorian hierarchy and VCAT is established and operates.[14]

Courts may refer proceeding to ADR with or without the parties' consent

Each of these Acts provides that the court may refer a proceeding to mediation[15] or arbitration,[16] or, in the Supreme Court and County Court, a special referee, with or without the consent of any party[17] (but the CPA gives the power to refer a civil proceeding or part to "appropriate dispute resolution", which includes, inter alia, reference to a special referee, but not without the parties' consent where the ADR will result in a binding outcome) (see note 34 below). In the Supreme Court, mediations may be carried out by associate judges,[18] costs registrars, a prothonotary or deputy prothonotary, or judicial registrars, and a proceeding in the Costs Court may be referred to a mediator.[19] A Supreme Court proceeding may, with the consent of all parties, be referred to arbitration.[20] The County Court, with the parties' agreement, may refer a civil proceeding to arbitration by an arbitral tribunal,[21] or by the court itself acting as an arbitrator,[22] or to an assessor,[23] or for the opinion of a legal practitioner about certain matters.[24]

Mediation privileged/immunity from suit

Each of these Acts provides to the effect that unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.[25]

Likewise, a special referee, mediator or arbitrator to whom a civil proceeding (or part thereof, or a question arising therein) is referred under such Act or the rules of court, or under the CPA, has the same protection and immunity as a judge in the performance of his or her duties as a judge.[26]

Civil Procedure Act

The CPA, which commenced on 1 January 2011, aimed to introduce a range of measures designed to achieve its overarching purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute in civil matters.[27]

One of the matters which the CPA in its statement of purposes is to provide for is the further enhancement of appropriate dispute resolution processes.[28]

The overarching purpose of the CPA is to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute".[29] Such purpose may be achieved by, inter alia, any appropriate dispute resolution process.[30]

Under the CPA, "appropriate dispute resolution" is defined to mean a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to:

(a) mediation, whether or not referred to a mediator in accordance with rules of court;
(b) early neutral evaluation;
(c) judicial resolution conference;
(d) settlement conference;
(e) reference of a question, a civil proceeding or part of a civil proceeding to a special referee;
(f) expert determination;
(g) conciliation; and
(h) arbitration.[31]

The "overarching obligations" apply in respect of the conduct of any aspect of a civil proceeding in a court, including appropriate dispute resolution.[32] Under the CPA, each of the participants in litigation has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including in appropriate dispute resolution.[33]

The CPA provides that a court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution, but only without the parties' consent where the appropriate dispute resolution does not result in a binding outcome. [34] Under the CPA, the courts may, by the use of their case managements powers, actively encourage the parties to use appropriate dispute resolution.[35]

Other Acts that provide for mediation or another form of ADR

There are many other Acts and Statutory Rules in Victoria that make provision for mediation and ADR. A retail tenancy dispute must first be referred for mediation or another appropriate form of alternative dispute

resolution before such a dispute may be heard and determined at VCAT.[36] A creditor must provide a farmer with the option to mediate before taking possession of property or other enforcement action regarding a farm mortgage under a farm debt dispute.[37] The Architects Registration Board of Victoria may refer a disciplinary complaint to mediation.[38] The Director of Consumer Affairs Victoria may refer to a consumer affairs employee for conciliation or mediation any dispute about a supply or possible supply of goods or services in trade or commerce[39] and a body corporate dispute.[40] Arbitrators have the power to act as a mediator, conciliator or other non-arbitral intermediary in arbitrations under the Commercial Arbitration Act.[41]

What happens if a party does not attend mediation?

If a proceeding has been referred to ADR and one of the parties does not attend, the party not attending may be ordered to pay the costs thrown away. In *Kullilli People v Queensland*,[42] a non-party Land Council was ordered to pay a party's costs of a mediation hearing on the basis that the non-party's actions caused the applicant to incur wasted costs in attending a mediation. In *Blue Cross Properties (Toorak) Pty Ltd v Mackie & Staff Pty Ltd*,[43] an application for costs in these circumstance was made but refused on the basis that it had not been established that the mediation had been wasted, given that the remaining parties proceeded in the absence of the respondent. Alternatively, judgment may even be entered against the defaulting party. In *Mulvaney Holdings Pty Ltd v Thorne*,[44] the court ordered that interlocutory judgment be entered against the respondent with compensation to be assessed on the applicants' respective claims as a result of the failure of the respondent to attend mediation ordered by the court and its failure to comply with disclosure obligations under the rules of court. Conceivably, a party may even be subject to contempt proceedings.[45] A party could be subject to contempt proceedings for failing to comply with an order for mediation, although it is likely that a specific order would need to be obtained ordering the respondent to attend a mediation at a particular place and time before he or she could be adjudged as guilty of contempt. At VCAT, if the tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as failing to attend mediation or the hearing of the proceeding, the tribunal may:

(a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or

(b) if the party causing the disadvantage is not the applicant —

(i) determine the proceeding in favour of the applicant and make any appropriate orders; or

(ii) order that the party causing the disadvantage be struck out of the proceeding;

(c) make an order for costs under s 109.[46]

Conclusion

Both federal and state legislation increasingly provides for ADR to be used by courts, tribunals and various agencies.[47] This policy has been actively pursued by the previous and present Victorian state governments. There is little doubt that the trend will continue.

John K Arthur
Barrister and Member of the Victorian Bar
Accredited Mediator, MCIArb
Isaacs Chambers

Footnotes

1. National Alternative Dispute Resolution Advisory Council (NADRAC), cited in Victorian Law Reform Commission (VLRC) *Civil Justice Review Report* May 2008 p 212 n 1, available at www.lawreform.vic.gov.au.
2. The term "appropriate dispute resolution" is defined in s 3 of that Act.
3. Above, n 1, p 212 n 4.
4. *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646; BC200205034 at [24]–[26], cited in *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249; BC201204250 at [56] per Croft J and on appeal in *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217; BC201312046 at [33] per Garde AJA (with whom Maxwell P and Tate JA agreed); *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* (2009) 26 VR 551; [2009] VSCA 308; BC200911422; *Cessnock City Council v Aviation & Leisure Corp Pty Ltd* [2012] NSWSC 221; BC201201256 at [31] per Hammerschlag J.
5. Comprising various levels and types of ADR, and providing that if one does not succeed, the parties go up to the next level: see, for example, *United Group Rail Services Ltd v Rail Corp (NSW)* (2009) 74 NSWLR 618; [2009] NSWCA 177; BC200905748; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666; [2013] WASCA 66; BC201301614.
6. See the list in the definition of "appropriate dispute resolution" in s 3 of the Civil Procedure Act 2010 (Vic). Various institutions in Australia, such as the Institute of Arbitrators & Mediators Australia (IAMA), the Australian Centre for International Commercial Arbitration (ACICA) and the Australian

Commercial Disputes Centre (ACDC) offer model clauses for arbitration and mediation, as well as for expert determination. See, for example, ACICA "Rules & Clauses", available at www.acica.org.au; IAMA "Standard Clauses for Use in Agreements", available at www.iama.org.au.

7. Above, n 5.
8. Supreme Court Act 1986 (Vic); County Court Act 1958 (Vic); Magistrates' Court Act 1989 (Vic).
9. VCAT was established under the Victorian Civil and Administrative Tribunal Act 1998 (Vic) and commenced operation on 1 July 1998, amalgamating 15 boards and tribunals to offer a "super-tribunal" dealing with a range of disputes. It is similar to the Western Australian State Administrative Tribunal, the Civil and Administrative Tribunal in the Australian Capital Territory, Queensland's Civil and Administrative Tribunal, and the NSW Civil and Administrative Tribunal, which commenced operation recently. See J Chaney "Australian super-tribunals — similarities and differences" 14 June 2013, available at www.sat.justice.wa.gov.au.
10. *Subway Systems Australia Pty Ltd v Ireland* [2013] VSC 550; BC201313787 per Croft J.
11. Practice Note No 4 of 2006.
12. This is the Standard Mediation Order on the Supreme Court website. See www.supremecourt.vic.gov.au and follow the link to "Forms".
13. Results from an Acts search carried out on 18 March 2014 at www.legislation.vic.gov.au. The compendium of Victorian Acts (cited in VLRC, above, n 1, p 215) prepared by the Department of Justice in 2006 regarding the different types of ADR legislated for in Victoria lists 73 separate pieces of Victorian legislation that refer to ADR, which is said not to be an exhaustive list.
14. Above, n 8.
15. For references to mediation, see Supreme Court: Supreme Court Rules, r 50.07; Court of Appeal of the Supreme Court, see r 64.21(3), (4); *Civil Procedure Victoria* LexisNexis at [I 50.07.07]; County Court: County Court Rules, rr 34A.21, 50.07; Magistrates' Court: Magistrates' Court Act 1989 (Vic), s 108(1); VCAT: Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 88(1), (2).
16. For references to arbitration: Supreme Court: Supreme Court Rules, r 50.08; County Court: County Court Act 1958 (Vic), s 47A; County Court Rules, r 50.08.
17. For references to special referee: Supreme Court: Supreme Court Rules, r 50.01–.06; County Court: County Court Act 1958 (Vic), s 47A; County Court Rules, r 50.08; VCAT: Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 95. In the Supreme Court, the parties may seek neutral evaluation from the judge: see Notice to the Profession 2009, Early Neutral Evaluation, Pilot Process, and see below in relation to powers under the Civil Procedure Act 2010 (Vic).
18. Supreme Court Rules, r 50.07.1–.4.
19. Above, n 18, r 50.07(2.1).
20. Above, n 18, r 50.08.
21. County Court Act 1958 (Vic), s 46 and see County Court Rules, r 50.08.
22. Above, n 21, s 47.
23. Above, n 21, s 48A.
24. Above, n 21, s 48B.
25. Supreme Court Act 1986 (Vic), s 24A; County Court Act 1958 (Vic), s 47B; Magistrates' Court Act 1989 (Vic), s 108; Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 92. See also Evidence (Miscellaneous Provisions) Act 1958 (Vic), s 211. While s 131(2)(h) of the Evidence Act 2008 (Vic) clearly allows for "without prejudice" communications between the parties that are relevant to the issue of costs to be admitted into evidence on that issue, such general provision must give way to s 24A, which is a specific provision concerning mediation: *Forsyth v Sinclair (No 2)* (2010) 28 VR 635; [2010] VSCA 195; BC201005509 at [12]–[15]. See *Civil Procedure Victoria* LexisNexis at [333.0].
26. Supreme Court Act 1986 (Vic), s 27A; Supreme Court Rules, r 50.07; County Court Act 1958 (Vic), s 48C; Magistrates' Court Act 1989 (Vic), s 108A (solely in respect of mediators, as arbitrations under the Magistrates' Court Act are summary adjudication processes undertaken by magistrates along with their other powers and duties, and quite distinct from arbitration under the Commercial Arbitration Act 2011 (Vic)).
27. Civil Procedure Act 2010 (Vic), s 7; *Civil Procedure Victoria* LexisNexis at [C1.01.0]–[C1.01.5].
28. Above, n 27, s 1(2)(d).
29. Above, n 27, s 7(1).
30. Above, n 27, s 7(2).
31. Above, n 27, s 3.
32. Above, n 27, s 11(c).
33. Above, n 27, s 16.
34. Section 66(1); the parties cannot be compelled under this provision to go to arbitration, or reference to a special referee, or expert determination: s 66(2).
35. Above, n 27, s 47(3)(d)(iii).
36. See Pt 10 of the Retail Leases Act 2003 (Vic).
37. Farm Debt Mediation Act 2011 (Vic).
38. Architects Act 1991 (Vic).
39. Australian Consumer Law and Fair Trading Act 2012 (Vic), s 114.
40. Owners Corporations Act 2006 (Vic), s 161.
41. Commercial Arbitration Act 2011 (Vic), s 27D.
42. *Kullilli People v Queensland* [1999] FCA 1449; BC9906952 per Drummond J.
43. *Blue Cross Properties (Toorak) Pty Ltd v Mackie & Staff Pty Ltd* [2007] VSC 304; BC200707077 per Habersberger J.
44. *Mulvaney Holdings Pty Ltd v Thorne* [2012] QSC 127; BC201203225.
45. See *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201; BC200303342 at [31]–[32].
46. Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 78(2).
47. Above, n 1, p 215.